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2-25-1999

## State of New York Public Employment Relations Board Decisions from February 25, 1999

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from February 25, 1999

### Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

### Comments

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**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CITY OF PLATTSBURGH**

**CASE NO. DR-062**

Upon a Petition for Declaratory Ruling

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**STUART H. BRODY, ESQ., for Petitioner**

**STAFFORD, TROMBLEY, PURCELL, OWENS & CURTIN, P.C.  
(EMY L. POMBRIO of counsel), for Plattsburgh Permanent  
Firemen's Association, Local 2421**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the City of Plattsburgh (City) to a decision by the Director of Public Employment Practices and Representation (Director) on the City's petition seeking a declaratory ruling as to the negotiability of a demand made by the Plattsburgh Permanent Firemen's Association, Local 2421 (Association) in a petition for compulsory interest arbitration. The Director found that the demand<sup>1</sup> related to wages, which constitute a mandatory subject of negotiations<sup>2</sup> and was, therefore, mandatory.

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<sup>1</sup>The demand is: "\$1.00 per hour to base salary for all members of the unit as long as the [City] Service Agreement remains in effect to reflect the change in workload and increased hazards."

<sup>2</sup> *Huntington Union Free Sch. Dist., No. 3*, 16 PERB ¶3061 (1983); *County of Suffolk and Suffolk County Legislature*, 15 PERB ¶3021 (1982).

The City excepts to the Director's decision, arguing that an unsubstantiated claim of increased workload or safety hazards is not sufficient to require negotiations midterm through a contract. The Association has not filed a response.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the Director finding the demand to be mandatorily negotiable, but express no opinion as to whether the City has a duty to negotiate or arbitrate that demand. A determination on the latter issue is not within the purview of a declaratory ruling petition.

In December 1996, the Association filed an improper practice charge (Case No. U-18453) alleging that the City had refused to negotiate the impact of its agreement with the Department of Defense to provide primary fire protection and ambulance service at the property formerly constituting the Plattsburgh Air Force Base. The City answered that there was no impact and no increase in workload or in safety hazards. At the pre-hearing conference in that matter, the City agreed to negotiate the Association's impact demand and the Association agreed to withdraw its charge. Thereafter, the City and the Association met one time, on June 4, 1997. The Association put forward the in-issue demand. The City did not agree to the demand and did not make a counter-proposal. The Association thereafter declared that an impasse existed and requested mediation. The mediator met once with the parties and, when no agreement was reached, released the parties to proceed to compulsory interest arbitration. The City then filed its response to the Association's petition for arbitration and this petition for declaratory ruling. The City and the Association agreed that the declaratory ruling petition would be decided on a stipulated record, consisting of

the pleadings and the correspondence between the parties and the assigned Administrative Law Judge.

A determination as to whether an impact demand deals with a mandatory subject of negotiations is not dependent upon a factual determination as to whether there has been or will be an impact caused by an employer's exercise of its management rights. Here, the Association's demand is for additional monies. Whether a wage increase is justified is an issue related to the merits of the demand, not whether the demand is mandatorily negotiable. The Director correctly determined that the Association's demand relates to wages and is, therefore, mandatory. That is the only determination permitted by our declaratory ruling procedure.

The City, in its exceptions, argues only that there has been no impact in fact and that it, therefore, should not be required to negotiate. The issues which may be raised in a declaratory ruling petition, however, are limited, in relevant respect, to scope of negotiations issues. The inquiry is limited to whether the demand in question is a mandatory, nonmandatory or prohibited subject of negotiations.<sup>3</sup> Here, the City has attempted to raise issues that are not relevant to a scope of negotiations inquiry, such as the existence of an actual impact of its service agreement upon unit employees or the meaning of a zipper clause in the parties' collective bargaining agreement. As noted by the Director, these issues are appropriately raised in an improper practice charge.<sup>4</sup> Our ruling that the demand presented is mandatorily negotiable is not a determination of separate questions regarding the City's duty to negotiate or arbitrate

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<sup>3</sup>*Waterloo Cent. Sch. Dist.*, 26 PERB ¶6501 (1993).

<sup>4</sup>It appears from the record in this case that these issues were raised by the City in its answer to the charge in Case No. U-18453.

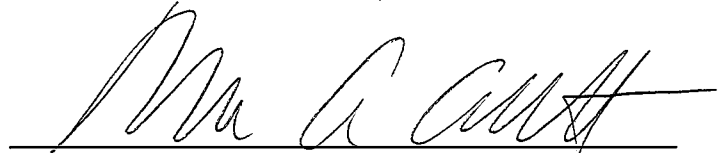
that demand. Whether the City's service agreement has actually impacted the terms and conditions of employment of unit employees and, if so, whether that impact is sufficient in nature or extent to expose the City to a duty to negotiate pursuant to a demand for additional wages are not issues properly before us under this petition.

For the reasons set forth above, the City's exceptions are denied and the decision of the Director is affirmed. SO ORDERED.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**OBDULIO BRIGNONI, JR.,**

Charging Party,

- and -

**CASE NO. U-20392**

**COUNCIL 82, AFSCME,**

Respondent.

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**OBDULIO BRIGNONI, JR., *pro se***

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Obdulio Brignoni, Jr., to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge alleging that Council 82, AFSCME (Council 82) had violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it unilaterally settled a class action law suit it had filed on the behalf of Brignoni and others against their employer, the State of New York (Department of Correctional Services) (State). Brignoni alleged that Council 82 had rejected a settlement offer which would have benefitted him and, instead, settled the lawsuit on terms which were detrimental to him. Brignoni was notified that the charge was deficient. He filed an amendment to the charge, but the Director, finding that the charge remained deficient, issued a decision dismissing it as untimely and as failing to set forth facts which, if established, would set forth a violation of the Act.

Brignoni excepts to the Director's decision, arguing that the charge is timely and that it pleads facts which prove that Council 82 violated the Act when it settled the in-issue lawsuit. Council 82 has not filed a response.

Based upon our review of the record and our consideration of Brignoni's arguments, we affirm the decision of the Director.

Brignoni is a corrections officer employed by the State. In July 1996, he accepted a promotion to the position of Correction Sergeant. He alleges that he did not know that the promotion was a temporary one. In July 1997, Council 82 filed a class action lawsuit against the State on behalf of the temporary sergeants, of which Brignoni is one, seeking to compel the State to cease its practice of promoting correction officers to sergeant positions on a temporary basis and to make permanent or contingent permanent promotions from the promotional list then in existence. Brignoni alleges that Council 82 rejected an offer in February 1998 from the State to settle the lawsuit in a manner which would have resulted in Brignoni's permanent appointment to a sergeant's position. On April 21, 1998, Council 82 and the State entered into a stipulation of settlement of the lawsuit which would have resulted in Brignoni being displaced from his temporary sergeant position and placed back in the position of correction officer.<sup>1</sup>

Brignoni's charge was filed on October 23, 1998, more than four months after the settlement of the lawsuit which forms the basis of his charge. Section 204.1(a)(1) of the Rules of Procedure requires that an improper practice charge be filed within four months

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<sup>1</sup>Brignoni voluntarily accepted the demotion before it became an involuntary demotion.



of the conduct which allegedly violates the Act. Brignoni's charge was filed six months after the acts complained of in his charge and is, as the Director held, untimely.

Brignoni argues in his exceptions that the grievance which he had filed about his temporary position was heard and denied at a Step 3 hearing on July 7, 1998. Using that date, he argues, renders his charge timely. If the acts complained of by Brignoni in the improper practice charge had occurred in July, his charge, filed in October, would have been timely. However, the charge alleges only that the settlement of the lawsuit, in April 1998, violated the Act. The hearing of Brignoni's grievance in July 1998 is not covered by his charge and does not serve to make the charge timely filed.

In his exceptions, Brignoni also argues that he was exhausting administrative remedies by pursuing the grievance that was denied in July 1998 and that should serve to extend his time to file. Our decision in *County of Suffolk*<sup>2</sup> is dispositive of this argument. It was there stated:

In *New York City Transit Authority*, 10 PERB ¶3077 (1977), a charging party had argued that the time during which to file a charge does not begin to run until the charging party exhausts its contractual remedies. We rejected this argument, holding that a contractual grievance procedure cannot be analogized to an administrative procedure. We stated that a grievance procedure is designed to protect private rights, while §209-a of the Taylor Law is designed to protect statutory rights, and that the two sets of rights do not always coincide.<sup>3</sup>

Brignoni's charge complains specifically about Council 82's settlement of the class action lawsuit and its adverse effect on his terms and conditions of employment, not its handling of his grievance. Brignoni's time to file the instant charge thus began to run

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<sup>2</sup>19 PERB ¶3003 (1986).

<sup>3</sup>Id. at 3006.

upon his being informed of the terms of the settlement of the lawsuit. By his own pleadings, that date is April 21, 1998. The charge is, therefore, untimely.

Additionally, even to the extent that the settlement of the lawsuit had some adverse effect on the outcome of Brignoni's grievance, there is no violation. Brignoni has not pled any facts to evidence arbitrary, discriminatory or bad faith actions by Council 82 in reaching the settlement of the lawsuit.<sup>4</sup> As we have previously held, "[a]ssuming that the employee organization otherwise comports with its duty of fair representation, the fact that some of its decisions may adversely affect some bargaining unit members does not give rise to a violation of the Act."<sup>5</sup>

For the reasons set forth above, we deny the exceptions and affirm the decision of the Director.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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<sup>4</sup>*Civil Serv. Employees Ass'n v. PERB*, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796, 21 PERB ¶7017 (1988). See also *New York City Transit Auth. and Transport Workers Union, Local 100*, 30 PERB ¶3064 (1997); *Faculty Ass'n of Hudson Valley Community College*, 15 PERB ¶3080 (1982); *Civil Serv. Employees' Ass'n (Kandel)*, 13 PERB ¶3049 (1980); *Brighton Transp. Ass'n*, 10 PERB ¶3090 (1977).

<sup>5</sup>*United Univ. Professions*, 22 PERB ¶3013, at 3033 (1989).

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, ORANGE COUNTY  
LOCAL 836, CITY OF NEWBURGH UNIT,**

Charging Party,

- and -

**CASE NO. U-16637**

**CITY OF NEWBURGH,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of  
counsel), for Charging Party**

**HITSMAN, HOFFMAN & O'REILLY (ALISON C. FAIRBANKS and KEVIN J.  
MCGUCKIN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Orange County Local 836, City of Newburgh Unit (CSEA) to a decision upon remand by the Director of Public Employment Practices and Representation (Director) dismissing its improper practice charge which alleges that the City of Newburgh (City) violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act). The improper practice charge alleges that the City, on January 1, 1995, unilaterally assigned to nonunit police officers animal control duties of a nonemergency nature which had previously been performed exclusively by an animal control officer and an assistant animal control officer. Those

positions had been in the unit represented by CSEA until, for economic reasons, they were abolished by the City Council effective December 31, 1994.

The Director held initially that the City's unilateral transfer of work that had been performed exclusively by CSEA's unit employees violated §209-a.1(d) of the Act.<sup>1</sup> The City thereafter filed exceptions on several grounds to the Director's first decision.<sup>2</sup> We then issued a decision<sup>3</sup> finding that the "transfer of the work in issue from animal control officers to police officers resulted necessarily in a significant change in qualifications under existing case law."<sup>4</sup> We remanded the case to the Director for consideration of the balancing test required by *Niagara Frontier Transportation Authority* (hereafter *Niagara Frontier*).<sup>5</sup> That case requires that where, as here, there has been a significant change in qualifications, the managerial interests of the employer and the interests of the unit employees, both individually and collectively, must be weighed against each other in reaching a conclusion as to whether a unilateral transfer of unit work constitutes a refusal to negotiate.

On remand, the Director, concluding that the abolition of the unit positions was a legislative act by the City Council that was not reviewable under §209-a.1(d) of the Act,

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<sup>1</sup>*City of Newburgh*, 30 PERB ¶4535 (1997).

<sup>2</sup>The Director dismissed the alleged violation of §209-a.1(e) of the Act. No exceptions were taken to that dismissal.

<sup>3</sup>31 PERB ¶3017 (1998).

<sup>4</sup>*Id.* at 3030. See, e.g., *State of New York (Dep't of Correctional Servs.) v. PERB*, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996), *conf'g* 27 PERB ¶3055 (1994); *Fairview Fire Dist.*, 29 PERB ¶3042 (1996).

<sup>5</sup>18 PERB ¶3083 (1985).

balanced only the loss of unit work against the City's managerial rights to determine qualifications and the nature and level of its services. Relying on our decision in *Fairview Fire District, supra*, the Director held that where there has been a significant change in qualifications, a loss of unit work by the charging party union, without more, is insufficient to support a finding that §209-a.1(d) of the Act has been violated.

CSEA excepts to the Director's decision, arguing that, while the abolition of the unit positions by the City Council is not the violation alleged, the loss of jobs still should have been considered by the Director in utilizing the *Niagara Frontier* balancing test. If the Director had done so, CSEA asserts that the balance would have been tipped in its favor. The City supports the Director's decision, but cross-excepts to the Director's denial of its motion to reopen the record and his rulings on the sequestration of witnesses at the hearing in this matter.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the Director.

The City Council abolished the positions of animal control officer and assistant animal control officer effective December 31, 1994, due to budgetary concerns despite the City Manager's recommendation to the contrary. The Director correctly found that this was a legislative action involving a nonmandatory subject of negotiation and was not violative of §209-a.1(d) of the Act.<sup>6</sup>

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<sup>6</sup>*City of Buffalo*, 29 PERB ¶3077 (1996); *City of Glens Falls*, 24 PERB ¶3015 (1991). See also *Odessa-Montour Cent. Sch. Dist.*, 27 PERB ¶3050 (1994), 28 PERB ¶3013 (1995), *rev'd*, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996); *Niagara County Legislature and County of Niagara*, 16 PERB ¶3071 (1983), *rev'd on other grounds*, 17 PERB ¶7003 (Sup. Ct. Niagara County 1984).

While CSEA argues that the job losses suffered by the animal control officer and the assistant animal control officer should be part of the *Niagara Frontier* balance, this argument clearly misapprehends the factors properly considered in the balancing test in a transfer of unit work case. The elimination by the City Council of the two jobs was not a consequence that flowed from the City's reassignment of the nonemergency animal control duties to the police, it is the action that precipitated the assignment of unit work to nonunit employees. The loss of jobs, therefore, cannot be a part of the balancing test to determine whether the City's action in transferring the unit work to nonunit employees violated the Act because it did not occur as a result of the transfer of unit duties.<sup>7</sup> As we noted in *Fairview Fire District*,

The simple loss of unit work is sufficient to support a violation when the balancing test under *Niagara Frontier* is not triggered, i.e., when there is not a significant change in qualifications. But if the balancing test under that decision is triggered by a significant change in qualifications, the loss of unit work is but one of the many factors which can be taken into account in making the balance.<sup>8</sup>

The Director correctly concluded that the significant change in qualifications resulted in a change in the nature and level of the service the City provides its constituents. These managerial concerns, when weighed against just the loss of unit

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<sup>7</sup>From the record before the Director, it appears that at least some of the nonemergency animal control duties remained in or have been returned to CSEA's unit as a result of a grievance filed by the police officers regarding the assignment of feeding and watering the animals and cleaning their cages. Apparently, those duties are now performed by employees of the City's Department of Public Works, who are in the unit represented by CSEA.

<sup>8</sup>*Supra* note 4, at 3099.

work, clearly prevail and render the decision to transfer unit work one the City was not required to negotiate.

Because of our disposition of the charge, we need not, and do not, reach the City's cross-exceptions related to the Director's rulings at the hearing.

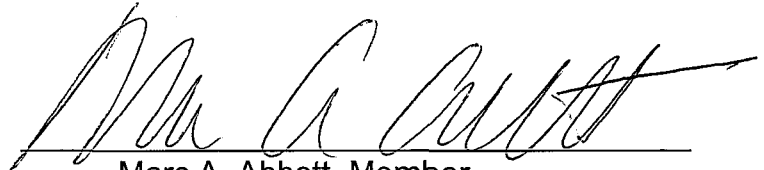
Based on the foregoing, we deny CSEA's exceptions and affirm the decision of the Director.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: February 25, 1999  
Albany, New York

A handwritten signature in cursive script, appearing to read "Michael R. Cuevas", written over a horizontal line.

Michael R. Cuevas, Chairman

A handwritten signature in cursive script, appearing to read "Marc A. Abbott", written over a horizontal line.

Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**WESTCHESTER COUNTY POLICE OFFICERS  
BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

- and -

**CASE NO. U-18956**

**COUNTY OF WESTCHESTER,**

Respondent.

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**RAYMOND G. KRUSE, ESQ., for Charging Party**

**ALAN D. SCHEINKMAN, COUNTY ATTORNEY (LORI A. ALESIO  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Westchester County Police Officers Benevolent Association, Inc. (PBA) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) conditionally dismissing this charge against the County of Westchester (County) pursuant to our merits deferral policy.<sup>1</sup> The PBA alleges in this charge that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally subcontracting certain work exclusive to the PBA's unit.

The parties have had the same maintenance of standards clause in their agreements since at least the contract for 1979-80. That clause provides as follows:

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<sup>1</sup>E.g., *Town of Carmel*, 29 PERB ¶13073 (1996).



Conditions of employment in effect prior to this agreement and not covered by this agreement shall not be reduced without good cause during the term of this agreement. "Good cause" may be determined through the grievance procedure herein, including Step No. 3.

In an earlier decision,<sup>2</sup> it was held that this charge should be deferred on its merits to the parties' grievance procedure if grievances under the maintenance of standards clause are subject to binding arbitration. As it was then unclear whether those grievances are arbitrable, the case was remanded to the Assistant Director to permit for a determination in that regard.<sup>3</sup>

The uncertainty as to whether maintenance of standard grievances are subject to resolution by binding arbitration stems from that part of the clause referring to "Step No. 3". The parties' 1979-80 contract had a three-step grievance procedure ending with a binding decision by a tripartite grievance board, the neutral member of which was selected by agreement or pursuant to the procedures of the American Arbitration Association. The parties' 1981-82 contract created a four-step grievance procedure by adding a new third step consisting of a hearing before the County's personnel officer. Binding arbitration was continued under that agreement, and all successors, but by a single arbitrator under what became the fourth step of the grievance procedure.

After a hearing, at which only the County's former Director of Labor Relations testified, the Assistant Director found that maintenance of standards grievances are arbitrable. The Assistant Director found upon the record that the parties did not intend

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<sup>2</sup>30 PERB ¶3073 (1997).

<sup>3</sup>The Assistant Director had not made any findings in this respect in his first decision.

to eliminate arbitration for maintenance of standards grievances when they agreed to a four-step grievance procedure in the 1981-82 agreement or at any time thereafter. The continuation, after 1981, of the reference to "Step No. 3", which had been the arbitration step under the 1979-80 contract, was merely an oversight according to the Assistant Director.

The PBA's exceptions challenge all of the Assistant Director's material findings of fact and law. The County has not responded.

Having reviewed the record and considered the parties' arguments, we affirm the Assistant Director's decision.

The PBA argues that the contract can mean only that maintenance of standards grievances are not arbitrable because Step 3 is the hearing before the County personnel officer. Step 4 is arbitration and the maintenance of standards clause does not refer to Step 4. This argument lacks merit for different reasons.

First, the language of the maintenance of standards clause was the same after the fourth step was added to the grievance procedure as it was before, when the grievance procedure had three steps. That clause subjects arguable violations of the maintenance of standards provision to a disposition "through the grievance procedure herein". Whether three steps or four, the grievance procedure has always had arbitration as its last step. That part of the maintenance of standards clause quoted immediately above plainly makes disputes involving the maintenance of standards arbitrable as they are resolved under the parties' "grievance procedure". The reference to "Step No. 3" in the latter part of the maintenance of standards clause is preceded by the word "including". Prior to the 1981-82 contract, the reference to Step 3 only gave

emphasis to the parties' intent that maintenance of standards grievances were not only grievable, but arbitrable. The carryover of the Step 3 language into the agreements starting with 1981-82 is not susceptible to a conclusion that maintenance of standards grievances end at Step 3. The word "including" does not mean "up to but not beyond". Even when the clause is read strictly, as the PBA advocates, the processing of a claim involving a maintenance of standards violation is subject to the "grievance procedure", a procedure which includes Step 3, but also steps before and after. The intent of the clause urged by the PBA would have been evidenced by use of the word "through" immediately preceding "Step No. 3", but not the word "including", which does not exclude the application of the prior or subsequent steps of the grievance procedure.

Second, the Assistant Director's conclusion is the only one consistent with the unrebutted record testimony. The County's former Director of Labor Relations, who held that position from 1975 until 1998, testified that there had not been any discussion about eliminating the availability of arbitration for maintenance of standards grievances. Nor was there any effort made by either party to amend the contractual references to steps after the grievance procedure went to four steps. The only reasonable conclusion to be drawn from the record is that the parties intended only to add an additional step to the grievance procedure before any grievance could proceed to arbitration, and to replace grievance arbitration before a tripartite panel with arbitration before a single arbitrator. The parties' failure to change the reference from Step 3 to Step 4, which is the basis for all of the PBA's arguments, was not even necessary given that maintenance of standards grievances are subject to the parties' grievance procedure that ends with arbitration.

The PBA would have us conclude that maintenance of standards disputes, which were arbitrable before 1981, were not arbitrable thereafter, despite the testimony which establishes that there was no intent to effect that result. Notwithstanding, as earlier noted, that not even the strictest reading of the existing maintenance of standards language in the PBA contract would warrant that conclusion, the controlling question in the interpretation of any agreement is the parties' underlying intent.<sup>4</sup> A conclusion that the parties' intended to eliminate the option of arbitration for maintenance of standards disputes without one word of discussion in that regard is simply unreasonable and contrary to this record and common sense. There is, for example, no reason even offered as to why only this particular type of dispute would be rendered ineligible for resolution by binding arbitration on and after 1981 when those disputes had been arbitrable before and when grievances regarding other contract terms are subject to that process.

The PBA also argues that its interpretation of the maintenance of standards clause must be correct because the County's agreement with another of its units refers in the maintenance of standards clause to "Step 4". For the reasons already advanced, that fact does not require a determination that the County-PBA contract means that maintenance of standards grievances involving PBA unit employees may not proceed beyond Step 3. The existing language allows for disposition at arbitration.

The PBA is also incorrect in stating or suggesting that application of our deferral policy is an affirmative defense to which the County bears some burden of proof. Our deferral policies, whether jurisdictional or merits, are not defenses to a charge. Rather,

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<sup>4</sup>22 N.Y. Jur.2d, Contracts §224.

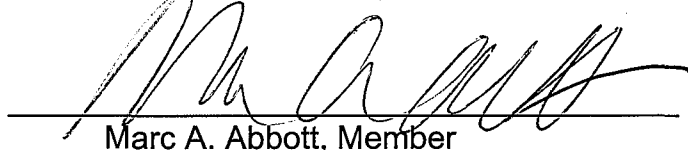
they are administrative devices fashioned by the agency to best give effect to the jurisdictional limitations in §205.5(d) of the Act and the policies of the Act favoring the adjustment of disputes through negotiated procedures. Invocation of these policies is simply not dependent upon the parties' wishes or their willingness or ability to marshal proof.

For the reasons set forth above, the exceptions are denied and the Assistant Director's decision conditionally dismissing the charge is affirmed. SO ORDERED.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC., LOCAL 1000, AFSCME, AFL-CIO,  
WESTCHESTER COUNTY LOCAL 860,  
UNIT 9200,**

Charging Party,  
-and-

**CASE NO. U-19287**

**COUNTY OF WESTCHESTER,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of  
counsel), for Charging Party**

**ALAN D. SCHEINKMAN, COUNTY ATTORNEY (KYLE C. MCGOVERN of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the County of Westchester (County) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Unit 9200 (CSEA). The charge alleges that the County violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated the probationary employment of Michael Holcomb.

After a hearing, the ALJ held that the County violated the Act as alleged. The ALJ concluded that Holcomb was engaged in protected activities, that Kenneth Grauer,

Holcomb's supervisor, knew of the protected activities, that Grauer's negative evaluation and recommendation to terminate Holcomb's employment was tainted by union animus, and that the recommendation contributed to Holcomb's termination. However, the ALJ did not find that but for the animus, Grauer would have made a different evaluation, or given a different recommendation. Nor did the ALJ find that Holcomb would have been continued in employment but for Grauer's recommendation because there were cited performance deficiencies.

The County argues in its exceptions that Holcomb was not protected in his activities because he was not a union representative and was not engaged in union-sanctioned activity. The County, moreover, denies that it terminated Holcomb's probationary employment because of any protected activity and argues that it was motivated by only legitimate business reasons. The County further argues that the ALJ improperly shifted the burden of establishing a *prima facie* claim of union animus from CSEA and placed that burden on the County.

CSEA, in response to the County's exceptions, argues that the ALJ's findings of fact and conclusions of law are correct, and that her decision should be affirmed.

Having reviewed the record, and having considered the parties' arguments, we affirm the decision of the ALJ but conclude that the remedial order should be modified.

– It is suggested in the County's exceptions that Holcomb's activities fall outside the protection of the Act because he was not a union representative and was not engaged in "union sanctioned" conduct. This argument is rejected for two reasons. First, Grauer believed Holcomb to be a union activist and that belief contributed to his

negative recommendation. Action taken upon a belief can violate the Act.<sup>1</sup> That this belief was later found to be incorrect does not convert what is otherwise an improper action into a proper one. Employment action adverse to an employee taken upon an employer's erroneous belief that an employee has engaged in protected activity is no less interfering or discriminatory in intent or consequence than actions taken with actual knowledge of the protected activity. Second, although a union representative may have some privileges not available to unit employees, union office is not a prerequisite to invoking the protections of the Act. It is the nature of the activity and not the identity of the employee that is controlling.<sup>2</sup> To limit protection to those holding an official union office would impermissibly encourage membership and active participation in the union or discourage the expression of any opinions other than those adopted by the leadership of the current bargaining agent. Both results are contrary to employees' fundamental rights under the Act to refrain from union membership or participation and to seek representation through an agent of their choice.

The County relies upon *State of New York (Division of Human Rights)*<sup>3</sup> to support its argument that the ALJ improperly shifted the burden of proof to it when she relied upon Holcomb's uncontradicted testimony of a conversation to establish knowledge of the protected activity. In *State of New York (Division of Human Rights)*, the ALJ used a failure to disclaim knowledge of remarks made at a meeting, where the

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<sup>1</sup>*Holbrook Fire Dist.*, 30 PERB ¶3062 (1997).

<sup>2</sup> *New York City Transit Auth.*, 20 PERB ¶3065 (1987).

<sup>3</sup>22 PERB ¶3036 (1989).



employer's agent was not even present, as the basis for imputing knowledge to the employer. The impermissible assumption was that colleagues who attended the meeting informed the employer's agent of the employee's protected conduct. *State of New York (Division of Human Rights)* is clearly distinguishable from the present case. In addition to the uncontradicted conversation between Holcomb and Grauer, knowledge is affirmatively established by a written evaluation referring to Holcomb's "union business" and a recorded phone conversation referring generally to his union activities.

It was the ALJ's factual finding that Grauer's negative recommendation was communicated to the department's commissioner prior to Holcomb's termination and formed part of the basis for that termination. The ALJ's findings in these regards are not disputed by the County and they are supported by the record, despite the fact that the May 8, 1997 letter terminating Holcomb's employment is dated before the May 9, 1997 written evaluation.

It is not suggested by this record that the department commissioner acted out of union animus in terminating Holcomb. However, in our decision in *Croton-Harmon Union Free School District*,<sup>4</sup> we reaffirmed prior holdings that where disciplinary action and/or termination result from improperly motivated employment action, §209-a.1(a) and (c) of the Act are violated. In the present case, both the evaluation and recommendation regarding Holcomb's employment status were tainted by Grauer's dissatisfaction with Holcomb's protected activities. The recommendation was improper,

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<sup>4</sup>31 PERB ¶3086 (1998).

and since the resulting termination was based at least in part on that recommendation, the termination itself is unlawful. While it may be true that an employer is free to terminate a probationary employee for any cause or no cause at all, this principle plainly does not apply if the employee is terminated in violation of the law. We find that Holcomb's termination stemmed from a recommendation tainted by union animus in violation of §209-a.1(a) and (c) of the Act.

Although agreeing with the ALJ that Holcomb's termination was unlawful and that his reinstatement is necessary to permit him to be reevaluated, the ALJ's unconditional back pay order is inappropriate. The remedial order is modified to condition back pay upon a reevaluation that results in Holcomb's continued employment. Back pay is only appropriate when the violation found has caused the at issue employment action. Based on the record before us, and the ALJ's own findings, it is impossible to conclude that Holcomb would have received a favorable evaluation absent Grauer's concern over his perceived union activism, let alone kept his job. If Holcomb would have been terminated on the basis of his job performance regardless of any exercise of protected activity, to reinstate him with back pay would not place him in the position he would have been but for the violation, but in a better position. Such a result goes beyond making Holcomb whole for the violation found and takes on the attributes of an impermissible penalty.

What is necessary to make Holcomb whole is the opportunity to have his job performance evaluation and supervisory recommendation made without regard to his union activities. It would be difficult, if not impossible, for Holcomb to obtain a new evaluation and recommendation, untainted by union animus, if Grauer were allowed to

conduct the same. Furthermore, the ALJ's remedial order requires that a *de novo* evaluation be conducted but does not require that such evaluation be preceded by a minimum reinstatement period. As Holcomb was terminated on May 16, 1997, almost two years ago, it is not reasonable or fair to expect that a true and accurate reevaluation can be made by recollection only.

To best effectuate the policies of the Act, the remedial order is also modified to require a second probationary period of employment be offered to Holcomb. The second probationary period shall be at least, but is not limited to, the minimum period of time specified by law for the purpose of evaluating probationary employees. Holcomb is to be reinstated to his former job title with the County but is to be placed outside the Department of Environmental Facilities and outside the direct or indirect supervision of Grauer. Should Holcomb be continued in employment at the end of his second probationary period, he is to be compensated for any loss of pay and benefits from May 16, 1997.

Based on the foregoing, the County's exceptions are denied, the ALJ's decision is affirmed, and the remedial order is modified.


IT IS, THEREFORE, ORDERED that the County:

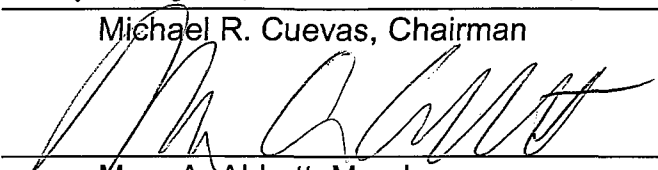
1. Rescind the evaluation of Michael Holcomb and the recommendation regarding his continued employment.
2. Offer Michael Holcomb immediate reinstatement to his former job title with a placement outside the Department of Environmental Facilities and outside the direct or indirect supervision of Kenneth Grauer for a second

probationary period of at least, but not limited to, the minimum time specified by law for the purpose of evaluating probationary employees.

3. Conduct a *de novo* evaluation of Michael Holcomb at the end of the time period specified in paragraph 2 above, without consideration of his union activities for the purpose of obtaining a recommendation regarding whether he should be continued in employment.
4. Compensate Michael Holcomb for any loss of pay and benefits he may have suffered by reason of his termination, from May 16, 1997 to the effective date of the offer of reinstatement, less any earnings or other compensation received by him during that time, with interest at the currently prevailing maximum legal rate, provided that the *de novo* evaluation referred to in paragraph 3 above results in his continued employment.
5. Not interfere with, restrain, coerce or discriminate against Michael Holcomb in its evaluation of him or in its recommendation and determination regarding his continued employment.
6. Post notice in the form attached in all locations ordinarily used to post notices of information to unit employees.

DATED: February 25, 1999  
Albany, New York

  
Michael R. Cuevas, Chairman

  
Marc A. Abbott, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Westchester (County) in the unit represented by the Civil Service Employees Association, Inc. Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Unit 922, that the County will forthwith:

1. Rescind the evaluation of Michael Holcomb and the recommendation regarding his continued employment.
2. Offer Michael Holcomb immediate reinstatement to his former job title with a placement outside the Department of Environmental Facilities and outside the direct or indirect supervision of Kenneth Grauer for a second probationary period of at least, but not limited to, the minimum time specified by law for the purpose of evaluating probationary employees.
3. Conduct a *de novo* evaluation of Michael Holcomb at the end of the time period specified in paragraph 2, without consideration of his union activities for the purpose of obtaining a recommendation regarding whether he should be continued in employment.
4. Compensate Michael Holcomb for any loss of pay and benefits he may have suffered by reason of his termination, from May 16, 1997 to the effective date of the offer of reinstatement, less any earnings or other compensation received by him during that time, with interest at the currently prevailing maximum legal rate, provided that the *de novo* evaluation referred to in paragraph 3 above results in his continued employment.
5. Not interfere with, restrain, coerce or discriminate against Michael Holcomb in its evaluation of him or in its recommendation and determination regarding his continued employment.

Dated .....

By: .....  
(Representative) (Title)

COUNTY OF WESTCHESTER  
.....

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO,**

Petitioner,

- and -

**CASE NO. C-4762**

**TOWN OF OSSINING,**

Employer.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of  
counsel), for Petitioner**

**RAINS & POGREBIN, P.C. (CRAIG L. OLIVO of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Town of Ossining (Town) to a decision of the Director of Public Employment Practices and Representation (Director) on a petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) seeking to represent a unit of full-time and part-time Town employees. The Director found that the most appropriate unit included the following full-time Town employees: deputy receiver of taxes, deputy town clerk, assessment clerk, assistant assessment clerk, assessment assistant, court clerk, chauffeur,

intermediate account clerk typist, food service helper, community service aide, and senior clerk.<sup>1</sup>

Thereafter, CSEA was given the opportunity to submit evidence of majority status sufficient to meet the criteria in §201.9(g)(1) of PERB's Rules of Procedure (Rules) for certification without an election. CSEA had submitted cards from a majority of the full-time employees in the proposed unit as its showing of interest in support of its representation petition. The cards are entitled "Application for CSEA Membership" and state: "I understand that my CSEA membership begins when dues are deducted". The cards also "authorize CSEA to be [the] exclusive representative for collective bargaining" and could thus be characterized as designation cards. Additional language on the card authorizes the employer to deduct dues from the signatory's salary in the amount certified by CSEA and further acknowledges that the card may be revoked at any time by written notice. To enable it to be certified without an election, CSEA proffered an affidavit, dated December 3, 1998, from Aldo Cafarelli, a supervising organizer with CSEA, attesting that the cards had not been revoked.<sup>2</sup> On December 21, 1998, the Director issued a letter decision recommending that CSEA be certified without an election as the bargaining agent for the unit of full-time Town employees.

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<sup>1</sup>CSEA had originally petitioned for a unit which included part-time employees in the titles of food service helper, intermediate stenographer, clerk, chauffeur and senior clerk. The Director found that there should be a separate unit of part-time employees. CSEA thereafter withdrew the petition as to part-time employees.

<sup>2</sup>The cards had been signed between December 1997 and February 1998.

The Town objects to the Director's recommendation that CSEA be certified without an election, arguing that the cards submitted by CSEA as evidence of its majority support were more than six months old at the time of the Director's decision and, therefore, could not be used to establish majority status for purposes of certification without an election. CSEA supports the Director's decision.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the Director.

Section 201.9(g)(1) of the Rules sets forth the requirements for certification without an election and provides, in relevant part:

(1) Certification without an election. If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the director on the basis of dues deduction authorizations and other evidence instead of by an election. In such a case, the employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the date of the director's decision recommending certification without an election.

The six-month time limitation in the Rules applies clearly to individual designation cards. To the extent that the showing of interest used by CSEA can be characterized as designation cards, they are clearly stale as the Rules specifically provide that such cards must have been executed within six months of the Director's decision.

As membership applications, the cards are also not appropriately used to evidence a showing of majority support. The cards do not evidence current membership, they are applications for membership conditioned on dues being



deducted, which itself cannot happen until CSEA is certified as the bargaining agent. A statement by an employee that he or she will join a union if it is certified is not evidence that the employee designates that union as the bargaining agent.

The cards are, however, also dues deduction authorizations. In *Village of Webster*,<sup>3</sup> we stated that:

Our Rules require, as a condition of certification without an election, the presentation of evidence that dues deduction authorization cards, if used as the evidence of majority status, are "current." We have always construed this term to mean reasonably current, and certainly not more than six months old, which is the limit contained in our Rules for the use of individual designation cards for certification without an election.

Here, the dues deduction authorization cards submitted by CSEA as its showing of interest in support of its representation petition were signed between December 1997 and February 1998. At the time of the Director's decision, the dues deduction authorization cards were at least nine months old. The Director in his uniting determination ordered an election unless evidence sufficient to satisfy the requirements of §201.9(g)(1) of the Rules was submitted within the time limits set forth in his decision. The Director accepted CSEA's affidavit as sufficient proof that the dues deduction authorization cards were current. We do not agree with the Director's conclusion.

In *Village of Webster, supra*, we remanded the case to the Director to conduct an election because at the time of certification the dues deduction authorization cards submitted by the petitioner were more than six months old. Our Rules were thereafter

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<sup>3</sup>21 PERB ¶3002, at 3003 (1988).

amended to permit the evidence of majority status to be assessed as of the date of the Director's decision recommending certification without an election, not at the time the case came before the Board for certification.<sup>4</sup> We did not, however, change the requirement that the dues deduction authorization cards be "current", as we have defined that term in *Village of Webster*. Under that decision, a dues deduction authorization is not current if it is more than six months old.

Our conclusion that a dues deduction authorization card is to be judged as "current" only by reference to the date the card was signed by the employee is further supported by a comparison of the certification without an election rule with the showing of interest requirements in §201.4(b) of our Rules. A showing of interest sufficient to enable a petition to be processed is established by "dues deduction authorizations which have not been revoked...." Certification, with or without an election, necessitates proof of majority status. For that reason, the certification without an election rules require that the dues deduction authorizations be "current". If we had intended to permit certification without an election to issue upon unrevoked dues deduction authorizations, we need only have incorporated the language in §204.1(b) of the Rules.

An unrevoked dues deduction authorization is not sufficient for purposes of certification without an election because it is equivocal as to employee intent. The affidavit submitted by CSEA indicates that the dues deduction authorization cards have not been revoked, but that does not render the cards a reliable indicator of majority support. The cards may not have been revoked for a variety of reasons not evidencing

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<sup>4</sup>§201.9(g)(1). Amend. filed and eff. May 20, 1992.

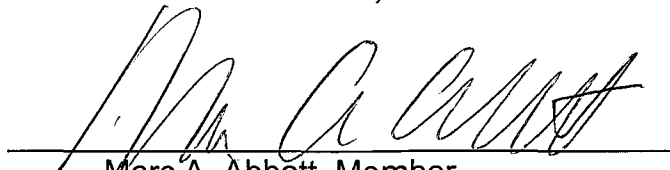
majority support. An employee may not be aware that the card may be revoked, may not know how to go about revoking the card, or may be under the impression that the card is no longer even in effect due to the lapse of time from its collection. Given the different reasons which might account for the dues deduction authorization cards not being revoked, an attestation of nonrevocation by a union agent, by itself, is not sufficiently reliable evidence of a union's majority support for purposes of a union's certification without an election.

Based on the foregoing, the decision of the Director is reversed and the case is remanded to the Director for further processing consistent with this decision. An election is to be scheduled unless CSEA submits to the Director new evidence of its majority status for purposes of certification without an election within such time as the Director shall specify. SO ORDERED.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**ISSA HOKAI,**

Charging Party,

- and -

**CASE NO. U-20388**

**TRANSPORT WORKERS UNION, LOCAL 100,**

Respondent,

-and-

**NEW YORK CITY TRANSIT AUTHORITY,**

Employer.

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**THOMAS P. HARTNETT, ESQ., for Charging Party**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Issa Hokai to a decision by the Director of Public Employment Practices and Representation (Director) dismissing his charge which alleges that the Transport Workers Union, Local 100 (TWU) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to adjourn a disciplinary arbitration hearing after Hokai had informed the TWU that he was ill and would not be able to attend.<sup>1</sup> Hokai was notified by the Director that his charge

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<sup>1</sup>Pursuant to §209-a.3 of the Act, Hokai's employer, the New York City Transit Authority (NYCTA), was made a statutory party.

was deficient. He filed attachments to the charge that he had not initially filed. The Director thereafter dismissed the charge, finding it untimely filed.

Hokai's charge was filed on October 19, 1998. In it he alleged that the TWU had failed to adjourn a disciplinary arbitration hearing scheduled for November 20, 1997, after Hokai had advised the TWU that he was ill and would not be able to attend.

Apparently, this information was not communicated to the arbitration panel. By an arbitration award dated December 30, 1997, Hokai was terminated by the arbitration panel for his failure to appear at the hearing. Learning of Hokai's dismissal, the TWU attempted, unsuccessfully, to have the hearing reopened. Thereafter, Hokai instituted an action against TWU and NYCTA in United States District Court for the Eastern District of New York under §301 of the Labor Management Rights Act of 1947. Both the TWU and the NYCTA raised objections as to that court's subject matter jurisdiction, because the NYCTA is a public employer within the meaning of the Act. Hokai then filed a Stipulation of Discontinuance Without Prejudice, withdrawing his court action on September 17, 1998. He, thereafter, filed this improper practice charge.

In his exceptions, Hokai argues that the Director erred in dismissing his charge as untimely filed. He asserts that his filing in federal district court was substantial performance of his duty to file within the appropriate time period, that PERB's filing period was tolled by reason of his court action and that he had completed "filing some form of his claim" by May 31, 1998, within four months after the TWU ceased, on January 31, 1998, its efforts to have the arbitration panel reverse its ruling, which renders his charge timely filed. No response to Hokai's exceptions was received from either the TWU or the NYCTA.

Based upon our review of the record and our consideration of Hokai's arguments, we affirm the decision of the Director.

Section 204.1(a)(1) of our Rules of Procedure requires that a charge be filed within four months of the alleged violative act. Here, the alleged violative act is the TWU's failure to advise the arbitration panel that Hokai would be unavailable on November 20, 1997, and to seek an adjournment of the scheduled arbitration hearing for that reason. Hokai knew of TWU's failure to adjourn the arbitration hearing no later than December 30, 1997, the date of the arbitration award. To be timely, Hokai's charge must have been filed no later than four months from that date.

Hokai's argument that his mistaken filing in federal district court should toll the filing period set forth in §204.1(a) of the Rules is without merit. The limitation period for filing improper practice charges is not tolled on the basis of a party's belief that a remedy might be obtained in another proceeding or forum.<sup>2</sup> We have also previously determined that the filing period is not tolled while ancillary proceedings are being pursued by or on behalf of a charging party, even when those proceedings have the potential to effectively moot the improper practice alleged.<sup>3</sup> Hokai's charge, filed almost one year after the action alleged to violate the Act is, therefore, untimely.

Based on the foregoing, we deny the exceptions and affirm the decision of the Director.

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<sup>2</sup> See, e.g., *New York City Transit Auth.*, 10 PERB ¶3077 (1977). See also *County of Suffolk Dep't of Labor Relations*, 19 PERB ¶3003 (1986).

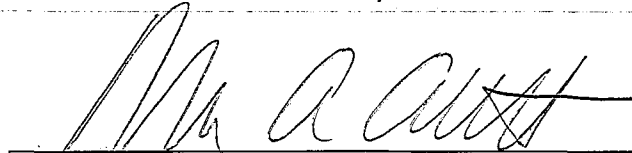
<sup>3</sup> *Orange County Correction Officers Benevolent Ass'n*, 28 PERB ¶3081 (1995).

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is,  
dismissed.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC., LOCAL 1000, AFSCME, AFL-CIO,**

Charging Party,

- and -

**CASE NOS. U-19029,  
U-19064 & U-19145**

**STATE OF NEW YORK (WORKERS' COMPENSATION  
BOARD),**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of  
counsel), for Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL VOLFORTE  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

These cases come to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by the Director of Public Employment Practices and Representation (Director) on charges against the State of New York (Workers' Compensation Board) (State). CSEA alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed a practice under which unit employees working in three different



locations were permitted an additional twenty minutes at lunch time on paydays to cash their paychecks without having to charge that time to their leave accruals.

After a hearing, the Director held that a "Benefits Guaranteed" clause in Article 39 of the parties' agreements was a reasonably arguable source of right to CSEA with respect to the issue of check-cashing time. Article 39 affords CSEA a right as against the State's action "to diminish or impair . . . any benefit or privilege provided by law, rule or regulation . . . without prior notice to CSEA; and, when appropriate, without negotiations with CSEA; . . . ." The Director concluded that CSEA's right under the Act to negotiate terms and conditions of employment before any changes to those terms and conditions are made is arguably a "benefit or privilege provided by law" within the meaning of Article 39. As a grievance would be potentially dispositive of the charges, the Director conditionally dismissed the charges pursuant to existing deferral policies.<sup>1</sup>

CSEA argues in its exceptions that the Director's conditional dismissal of the charges grounded upon Article 39 was fundamentally unfair and a violation of its due process rights because it was not notified that Article 39 was in issue.

The State argues in response that the Director's decision was based upon evidence in the record and it was wholly consistent with existing precedent.

Having reviewed the record and considered the parties' arguments, we remand the cases for the receipt of arbitration awards or judicial decisions regarding the applicability of Article 39 to the leave-time benefit at issue under these charges and such other evidence as the Director determines is relevant to that issue.

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<sup>1</sup>E.g., *Town of Carmel*, 29 PERB ¶3073 (1996).

The parties' agreements containing Article 39 were in evidence. It was the Director's right and obligation to consider all of the record evidence when making a disposition of these charges. It was also his right and obligation to apply our existing law to the record facts, whether or not the parties argued that law to him. Parties to our proceedings are expected to appreciate the potential relevance of all record evidence and to fashion their legal arguments in light of that evidence, both as to the theories they believe will support their claims and those which may affect those claims adversely. This does not mean, however, that the Director's deferral of these charges was correct.

As the Director rightly observed, our deferral policies, whether jurisdictional or merits, hinge ultimately on whether the parties' agreement reasonably affords a charging party rights with respect to the subject matter of the improper practice charge. If a charging party is without reasonably arguable rights under an agreement, there can be no violation of that agreement and the pursuit of a grievance would be to no end.

Deferral to the parties' grievance arbitration procedure obviously is not appropriate if Article 39 is not applicable to the State's alleged unilateral rescission of this particular benefit. Questions as to whether a contract clause is applicable are distinct from questions as to whether that clause, if applicable, has been violated in fact. Proof as to the latter is immaterial in a deferral analysis because the contract violation need only be reasonably arguable, a standard tested by the language of the clause. Constructions of Article 39 by arbitrators or judges who have the jurisdiction to interpret the parties' contract, however, are ones we are either required to accept on *res judicata* or *collateral estoppel* principles or ones we should accept in furtherance of the

Legislature's intention to remove us from contract interpretation except as may be necessary to a disposition of charges over which we have and exercise jurisdiction.<sup>2</sup>

The deferral policies the Director relied upon were adopted by us years ago to give effect both to the limitations imposed in §205.5(d) of the Act regarding our jurisdiction over contract violations and those policies of the Act favoring the use of consensual grievance arbitration procedures. As those deferral policies represent the agency's belief as to how best to give effect to the Legislature's declarations, their invocation is simply not dependent upon the wishes or the arguments of the parties. Neither should their application hinge upon a failure of record evidence, whether that failure is attributable to a party or the agency's presiding officer.

CSEA alleges to us that there are arbitration awards holding that Article 39 is not applicable to unilateral changes in extra-contractual terms and conditions of employment. The Director did not know this because he did not inquire in this regard and CSEA made no offer of proof.

It is inconceivable that the Director would have declined to consider relevant arbitration awards in deciding whether Article 39 is applicable to the circumstances presented by these charges. It is equally inconceivable that CSEA would have not offered those awards if it had believed that the Director considered Article 39 to be a source for potential deferral of the charges. Although we would not ordinarily consider allegations raised or offers of proof made for the first time in exceptions, on the issue of deferral, it is the agency's right and responsibility, more so than the parties', to ensure that the deferral policies we have fashioned to give effect to the Legislature's intent are

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<sup>2</sup>*Roma v. Ruffo*, 92 N.Y.2d 489, 31 PERB ¶7504 (1998).

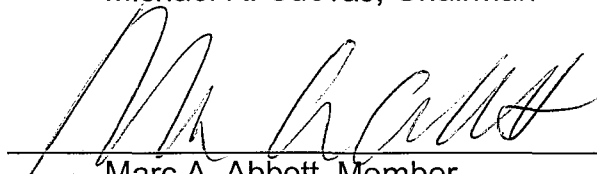
correctly applied. Moreover, we cannot say in this case that CSEA's failure to offer the arbitration awards was intentional or culpably negligent. Rather, it appears that arbitration awards interpreting Article 39 were not made part of the record either because CSEA reasonably misunderstood the implications of the Director's statements to CSEA's counsel during the hearing or because the Director did not make a specific enough inquiry about the applicability of Article 39. The Director inquired whether his understanding that CSEA considered Article 39 inapplicable was correct. CSEA's counsel then stated, "Right. Yes.", to which the Director replied, "That's what I thought." There was not any further comment regarding Article 39. The Director's comment was at least ambiguous and that may have contributed to the absence of evidence pertaining to the applicability of Article 39. A remand on the issue of deferral is appropriate in such circumstances.

For the reasons set forth above, the cases are remanded to the Director for the receipt of any decisions or awards interpreting Article 39 which either party may offer, and such other stipulations or evidence the Director may consider relevant to the question of the applicability of Article 39. Upon the close of the record upon remand, the Director is to issue such decision as may be necessary and appropriate. SO ORDERED.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**ORGANIZATION OF STAFF ANALYSTS,**

Petitioner,

- and -

**CASE NOS. C-4637 & C-4655**

**MANHATTAN AND BRONX SURFACE TRANSIT  
OPERATING AUTHORITY,**

Employer.

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JOAN STERN KIOK, ESQ., for Petitioner

EVELYN JONAS, ESQ., for Employer

**BOARD DECISION AND ORDER**

On January 21, 1997, the Organization of Staff Analysts (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, timely petitions seeking certification as the exclusive representative of certain employees of the Manhattan and Bronx Surface Transit Operating Authority (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included:        Staff Analysts and Associate Staff Analysts.

Excluded:        All confidential employees and all other employees.

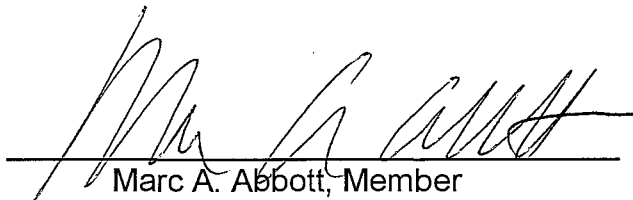
Pursuant to that agreement, a secret-ballot election was held on February 5, 1999, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petitions should be, and they hereby are, dismissed.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CONNETQUOT CLERICAL ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-4722**

**CONNETQUOT CENTRAL SCHOOL DISTRICT,**

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION,  
LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Connetquot Clerical Association has been designated and selected by a majority of the employees of the above-named public

employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All regular, permanent full-time and part-time clerical employees.

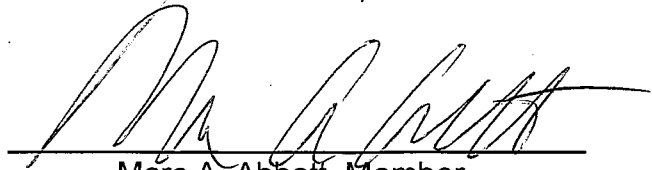
Excluded: Superintendent, Administrative Assistants, all department supervisors, all other supervisory, managerial or confidential employees, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Connetquot Clerical Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL 693,**

Petitioner;

-and-

**CASE NO. C-4834**

**VILLAGE OF ENDICOTT,**

Employer,

-and-

**SEWAGE TREATMENT PLANT EMPLOYEES,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters, Local 693, has been designated and selected by a majority of the employees of the

above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Laborer, Motor Equipment Operator, Senior WWTP Operator, and WWTP Mechanic.

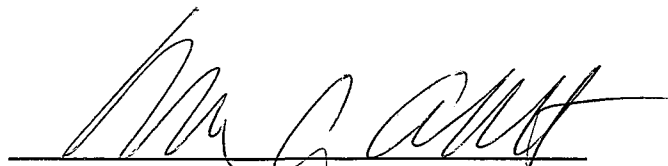
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local 693. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**RONALD FAUCHER,**

Petitioner,

-and-

**CASE NO. C-4828**

**MASSENA HOUSING AUTHORITY,**

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, (MASSENA  
HOUSING AUTHORITY UNIT 8428),**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding<sup>1/</sup> having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc.,

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<sup>1/</sup> The petition sought to decertify the intervenor.

Local 1000, AFSCME, AFL-CIO, (Massena Housing Authority Unit 8428) has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Building Maintenance Workers, Cleaner, Youth Activities Coordinator, Youth Activities Aide, Modernization Coordinator, Tenant Relations Assistant, Keyboard Specialist.

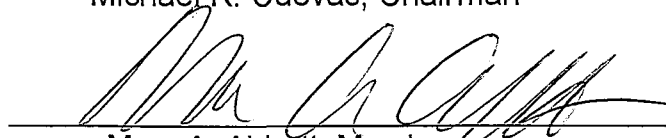
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, (Massena Housing Authority Unit 8428). The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**ORGANIZATION OF STAFF ANALYSTS,**

Petitioner,

-and-

**CASE NOS. C-4605 & C-4634**

**NEW YORK CITY TRANSIT AUTHORITY,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matters by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Organization of Staff Analysts has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Staff Analysts and Associate Staff Analysts.

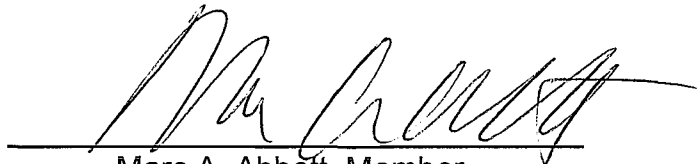
Excluded: All confidential employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Organization of Staff Analysts. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-4839**

**HUNTINGTON SCHOOL DISTRICT,**

Employer,

-and-

**HUNTINGTON FOOD SERVICES ASSOCIATION,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All contract cafeteria personnel including but not limited to cook-managers, cooks, assistant cooks, bakers, food service workers and other cafeteria workers.

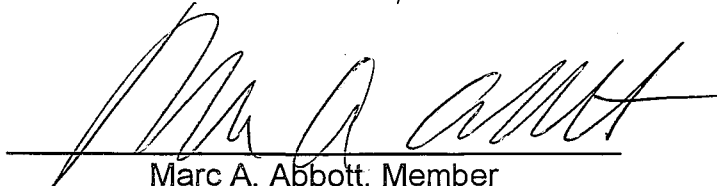
Excluded: All other District employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 25, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member